APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED MARCH 10, 1999

United States Court of Appeals for the Federal Circuit

98-1340

COMMERCIAL ENERGIES, INC.,

Appellant,

v.

RICHARD J. DANZIG, SECRETARY OF THE NAVY,

Appellee,

DECIDED: March 10, 1999

Before RICH, NEWMAN, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

Commercial Energies, Inc. (CEI) sought compensation under its contract to supply the Great Lakes Naval Training Center with natural gas over a period of eighteen months. On appeal to the Armed Services Board of Contract Appeals, the Board (1) found that the Navy breached the contract in two of the months, but denied any recovery to CEI for failure to prove its damages; (2) found that the Navy did not breach the contract in a third month; and (3) awarded CEI an adjustment under the contract for changes in the transportation tariffs for natural gas. Because CEI has not shown any reversible error by the Board, this court *affirms*.

Appendix A

I.

A.

On March 24, 1989, CEI contracted with the Great Lakes Naval Training Center to supply its natural gas requirements for a six-month base period with two six-month option periods. The contract required the Navy to specify an amount of gas required from CEI at least ten days in advance of each month. CEI arranged to have the natural gas transported through a gas pipeline owned by the Natural Gas Pipeline Company of America (NGP) to a delivery point known as the "City Gate." The Navy contracted with the local gas supplier, North Shore Gas Company (North Shore), to transport the gas from the City Gate into the Training Center. That contract set a daily "cap" on the amount of natural gas that any particular supplier could send through North Shore's distribution system.

In an August 5, 1996 decision, the Board found that this daily cap on occasion prevented CEI from transporting gas to meet the Navy's forecast. Because the Navy had entered into the contract with North Shore without CEI's knowledge, the Board concluded that, to the extent the daily cap caused CEI's gas shipment shortfalls, the Navy breached its contract with CEI. In reaching that conclusion, the Board analyzed the relevant contract provisions. Section C.6 of the contract, entitled "Natural Gas Requirements," provides: "The government shall purchase natural gas . . . exclusively from [CEI] or [North Shore] during the term of this contract." Attachment B, Rider 16 to the contract further provides: "In the event of an *interruption or curtailment* of deliveries of [CEI]-owned gas supply to [North Shore],

[North Shore] will stand by to make up any deficiency in such supply."

The record shows that the Navy purchased natural gas from North Shore in several months during the life of the Navy's contract with CEI. To determine whether these purchases constituted a breach, the Board looked to whether the Navy bought gas from North Shore because of an "interruption or curtailment" of CEI-owned gas. The Board interpreted that phrase to encompass two situations: first, when CEI was "bumped" off NGP's distribution network[1] and, second, when the Navy's actual gas usage exceeded its estimate in a given month. In either of those situations, the Navy could purchase gas from North Shore rather than CEI. The Board further determined, however, that "interruption or curtailment" did not encompass the situation where North Shore's daily cap prevented CEI from delivering gas to the Training Center.

Applying this interpretation, the Board found that North Shore's daily cap only prevented CEI from delivering gas in November 1989 and July 1990. Accordingly, the Board found the government in breach of its contract with CEI for those months. The parties agreed that the measure of damages for that breach was CEI's lost profits for the gas it

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1. NGP provided two types of transportation services to customers: firm and interruptible. "Firm" service guaranteed delivery and space on the pipeline. A customer with "interruptible" service could be "bumped" off the pipeline by "firm" service customers when weather constraints limited NGP capacity. CEI's supplier of natural gas had contracted with NGP for "interruptible" service.

could not deliver because of the daily cap. The Board held a hearing to determine this amount.

At the quantum hearing, CEI submitted evidence of its lost profits for November 1989 and July 1990. CEI also asserted, based on documents it obtained after the Board's entitlement decision, that the government breached the contract in December 1989 by purchasing gas from another company, People's Gas, Light, and Coke (PGLC). The Board found that CEI had not met its burden of proving either lost profits for November and July, or that the government breached the contract in December. CEI appeals both decisions.

B.

CEI also appeals another portion of the Board's quantum decision relating to a "transportation rate adjustment" under the contract. As bid, the so-called "City Gate" price of natural gas consists of the price of the gas itself plus the price to transport the gas through NGP's pipelines to the City Gate. CEI contracted a fixed transportation price of $.32521 per decatherm of natural gas.

The Federal Energy Regulatory Commission (FERC) is the body responsible for setting transportation tariffs for natural gas. After the contract was awarded, FERC approved revised transportation tariffs effective retroactively during the term of the contract. The contract, however, provided for such a contingency. Read together, the following sections state that, if the appropriate regulatory commission

(i.e. FERC) authorizes a change in the transportation tariff, and the change affects the actual cost of transportation to the City Gate, CEI will be due a transportation rate adjustment from the Navy.

C.4 DEVELOPMENT OF GOVERNMENT PRICING STRUCTURE

(a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . . .

First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, *provided that such changes affect the actual cost of transportation to the city gate.* The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority . . . .

H.14 TRANSPORTATION PRICE ADJUSTMENTS

A. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply:

(1) If during the term of this contract the appropriate regulatory commission authorizes an

> increase or decrease in the tariff supporting the Section B transportation prices the Contracting Officer shall amend this contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective.

Thus, in its entitlement decision, the Board granted CEI a transportation rate adjustment because FERC revised the applicable transportation rates during the life of the contract. Because section C.4, above, required that changes in the transportation rate "affect the actual cost of transportation," the Board required CEI to show its actual costs before awarding any transportation rate adjustment. For several natural gas deliveries, the Board found that CEI submitted no evidence of its actual costs, and thus disallowed any recovery for those deliveries. As to the remaining gas deliveries, the Board found that the best way to determine how CEI had been affected by the tariff rate revisions would be "the documented payment by CEI of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions." *Commercial Energies, Inc.*, ASBCA No. 50316, 98-1 BCA ¶ 29,549. The record, however, contained no such evidence. Lacking such evidence, the Board compared instead the "theoretical" transportation charge at the time of contract award with the "theoretical" transportation charge at the time of each gas delivery. From this comparison, the Board calculated an adjustment of $1,145.79. CEI appeals the Board's methodology.

Appendix A

II.

This court will reverse the Board's decision if it is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b) (1994). Contract interpretation, however, is a matter of law that this court reviews *de novo*. *See Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996).

A. *Quantum for Breach of Contract*

At the quantum hearing for the November 1989 and July 1990 breaches, CEI sought lost profits measured by the difference in the contract price for the natural gas and the actual price CEI paid for the gas (i.e. gross profit). The Board, however, determined that CEI was only entitled to the difference between the contract price and *all* costs CEI incurred to perform and deliver the gas to the Navy (i.e. net profit). CEI's president testified that, in addition to the costs it incurred for purchasing and transporting the natural gas, it incurred "management" costs and "a whole bunch of other things." Because the record contained no evidence of these other costs, the Board denied CEI any recovery.

This court cannot say that the Board abused its discretion in limiting CEI's recovery to net profits. Allowing CEI to recover its gross profits would potentially overcompensate CEI for any harm it suffered.[2] As to the

2. Even using CEI's proposed methodology, this court cannot substantiate the amount of profit CEI claims. For example, CEI (Cont'd)

evidentiary deficiencies, CEI points to nothing in the record allowing the calculation of net profits. Accordingly, this court affirms the Board's decision to deny CEI any recovery for the Navy's November 1989 and July 1990 breaches.

B. *Breach of Contract for December 1989*

CEI claims that the Board erred in finding that the Navy did not breach the contract in December 1989. CEI bases its argument on documents it interprets to show that the Navy purchased in December a significant amount of gas from PGLC, which is not a contract-authorized source of gas. The Board, however, specifically found that CEI did not prove any Navy purchase of gas from PGLC in December, and that the Navy had no contract with PGLC to supply gas. The Board also found that PGLC merely owned the meters that measured the gas North Shore supplied to the Navy, which explains why the documents relied on by CEI to show deliveries by PGLC bear the "Peoples Gas Light Coke" name. CEI does not challenge this finding.

In its reply brief and during oral argument, CEI argued that even if the Navy purchased the gas from North Shore, not PGLC, it still breached the contract. To the contrary, however, not every Navy purchase of gas from North Shore

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(Cont'd)
states in its brief that its July 1990 contract price for gas was $1.85 per decatherm and that its corresponding cost was $1.65 per decatherm, yielding a profit of $0.20 per decatherm. Yet, CEI claims it is entitled to a profit of $.52521 per decatherm for that month.

constitutes a breach. The contract authorizes the Navy to purchase gas from North Shore when CEI is bumped off the NGP line, or when the Navy's actual gas usage exceeds its forecast for the month. Under the Board's interpretation, which this court finds reasonable, the Navy was only held in breach when North Shore's daily cap prevented CEI from supplying gas to the Navy. CEI points to no evidence that North Shore's daily cap affected the amount of gas CEI delivered in December. For these reasons, this court affirms the Board's finding that the Navy did not breach the contract in December 1989.

C. *Transportation Rate Adjustment*

CEI assigns error to the Board's methodology in calculating a transportation rate adjustment of $1,145.79. CEI asserts that the Board should have measured the transportation rate adjustment by comparing the revised FERC tariff rates with the amount the government actually paid CEI for transportation of the gas (i.e. the transportation price set forth in the contract). That method yields a transportation rate adjustment of $277,902.25.

CEI's proposed method, however, overcompensates CEI for changes in the FERC tariffs. The contract provisions providing for a transportation rate adjustment account for any changes in the actual cost of transportation paid by CEI due to changes in the applicable transportation tariffs. CEI's comparison of the revised tariff rates to the *contract price* for transportation bears no relationship to this purpose. The contract price is the price paid by the Navy to CEI, not by CEI to its suppliers.

Instead, as the Board noted, the actual effect of the tariff revisions on CEI would best be shown by evidence of payments by CEI to its suppliers of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions. Because the record contained no such evidence, the Board attempted to approximate this amount by comparing the theoretical transportation rates at the time of contract award (based on the then-applicable FERC tariffs) with those at the time of delivery (based on the revised FERC tariffs). This court can discern no abuse of discretion in the selection of this methodology, which adequately captures the effect of the tariff revisions on CEI. Moreover, substantial evidence supports the theoretical transportation rates used by the Board. Accordingly, this court affirms the transportation rate adjustment awarded CEI.

APPENDIX B — OPINION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS BY ADMINISTRATIVE JUDGE JAMES DATED JANUARY 26, 1998

ARMED SERVICES BOARD OF
CONTRACT APPEALS

ASBCA No. 50316

Appeal of —
Commercial Energies, Inc.
Under Contract No. N62472-88-D-0817

* * *

OPINION BY ADMINISTRATIVE JUDGE JAMES

With respect to entitlement, we sustained the contractor's appeal on three claim elements: (1) breach of the captioned requirements contract by purchase of natural gas from another source; (2) calculation of the ceiling cost adjustment; and (3) transportation cost adjustment. *Commercial Energies, Inc.*, ASBCA No. 47106, 96-2 BCA ¶ 28,474. The parties resolved the ceiling cost adjustment issue, but were unable to agree upon quantum for the breach and transportation cost adjustment. We reinstated the appeal and assigned docket No. 50316 to these quantum issues. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a two-day hearing in Denver, Colorado, the parties submitted post-hearing briefs.

Appendix B

FINDINGS OF FACT

Familiarity with the Board's decision on entitlement, 96-2 BCA ¶ 28,474, is assumed. However, for convenience we summarize some of our previous background findings.

1. On 24 March 1989 the parties entered into Contract No. N62472-88-D-0817 (contract 817) to supply natural gas, classifications 2 and 3, to the "City Gate" near the Great Lakes Naval Training Center (GLNTC) for a six-month base period, with two six-month option periods (ASBCA 47106, finding 1).

2. The "City Gate" was the point of delivery of gas from the Natural Gas Pipeline Company of America (NGP) into the North Shore Gas Company's (NSGC) local distribution system at Grayslake, Illinois, also termed delivery point "A-20" or "M-20" (ASBCA 47106, findings 1, 33).

3. Contract 817 specified the following unit prices per decatherm for the base period and the two option periods:

Period	Gas	+	Transportation	=	Total Price
3/24/89 to 9/23/89	$1.75		$0.32521		$2.07521
9/24/89 to 3/23/90	$2.30		$0.32521		$2.62521
3/24/90 to 9/23/90	$1.85		$0.32521		$2.17521

(ASBCA 47106, findings 1, 10)

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Breach of Contract

4. Contract 817 provided:

> H.3 REQUIREMENTS (APR 1984) FAR 52.216-21 . . . Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.
>
> * * *
>
> C.6 NATURAL GAS REQUIREMENTS . . . The Government shall purchase natural gas for the loads identified in Attachment A exclusively from the offeror or the North Shore Gas Company during the term of this contract.

Attachment B, Rider 16, provided in pertinent part:

> In the event of an interruption or curtailment of deliveries in customer-owned gas supply to the [NSGC], the Company will stand by to make up any deficiency in such supply. Such stand-by service will be made available to the customer under the companion classification, to the same extent it would be available to the customer absent service under this Rider.

(ASBCA 47106, finding 2)

5. NSGC's daily cap prevented CEI from delivering 32,482 decatherms of gas (200,000 decatherms ordered *vs.* 167,518 decatherms delivered) in November 1989, and 43,656 decatherms of gas (125,000 decatherms ordered *vs.* 81,344 decatherms delivered) in July 1990 (ASBCA 47106, findings 8, 13, 15, 17, 21; exhs. G-1Q, G-10; tr. 2/129).

6. For the total of 167,518 decatherms of gas CEI delivered to respondent in November 1989, CEI paid its suppliers: (a) 145,587 decatherms at $2.02/decatherm; (b) 13,977 decatherms at $2.14/decatherm; and (c) 7,954 decatherms at $2.40/decatherm, for an average of $2.04806/ decatherm ($343,086.12 / 167,518)(exhs. G-10, G-2Q at 14, G-20Q). Respondent bought 145,857 decatherms of gas from NSGC in November 1989, including 32,482 decatherms whose delivery the NSGC daily cap prevented on 29-30 November 1989 (ASBCA No. 47106, finding 24; exh. G-10). The record does not show on which day(s) in November 1989 NSGC delivered the other 113,375 decatherms (145,857 - 32,482), or that the GLNTC could have used 113,375 decatherms in 48 hours or less in that month.

7. For July 1990 CEI paid its supplier $1.65/decatherm for delivering to the "City Gate" 81,344 decatherms of gas (exhs. G-2Q at 14, G-20Q).

8. CEI sought to show that respondent purchased 284,384 decatherms of additional classification 2 and 3 gas for GLNTC from People's Gas, Light and Coke (PGLC) in December 1989 (tr. 2/132, 139). Respondent contracted for delivery of natural gas to GLNTC in 1989-90 only from

CEI and NSGC, and had no contract with PGLC (tr. 2/169-70, 222-23). Gas purchased from NSGC was measured on PGLC-owned meters (tr. 2/172-73). We find no evidence that respondent purchased gas from PGLC in December 1989. CEI failed to deliver the quantity of gas ordered for December 1989 when its interruptible orders were bumped off the NGP by cold weather and other actions by NGP (exh. A-K).

9. CEI's president, Lewis R. Dodds, testified that its lost profits for November and December 1989 and July 1990 were $.57729, $.23521 and $.52521 per decatherm, respectively (tr. 2/135). On cross-examination, respondent repeatedly asked Mr. Dodds to explain how he calculated those lost profit amounts (tr. 2/150-65). Mr. Dodds identified no specific figures for costs CEI incurred, but said that, in addition to the costs it incurred for purchasing natural gas from suppliers, and for transporting such purchased gas to the "City Gate," CEI incurred other costs:

> Q. Mr. Dodds . . . am I not correct that your profit is the difference between your contract price for gas and what you were actually paying for gas that month?
>
> A. And my management and a whole bunch of other things.

(Tr. 2/150) The record contains no evidence of the costs of "management" or "a whole bunch of other things," Mr. Dodds' salary, "what counsel was going to cost" (tr. 2/164), or any other overhead or general and administrative costs

incurred by CEI during November and December 1989 and July 1990 or at any other time during performance of contract 817. We find that one cannot determine from this record the amount of profit, measured by the difference between the gas price in contract 817 and all costs CEI incurred to perform and deliver such gas to respondent, which CEI lost in the months of November 1989 and July 1990 on account of gas respondent purchased from other sources.

DECISION

In our entitlement decision we held that respondent "breached contract 817 when NSGC's daily 'cap' prevented CEI from transporting gas to the [GL]NTC in November 1989 and July 1990." ASBCA No. 47106, 96-2 BCA at 142,208. The parties agree that CEI's lost profit on gas not supplied is the measure of damages for such breach.

CEI argues that respondent breached by purchasing gas for GLNTC from PGLC in December 1989. CEI did not prove that respondent bought any gas for GLNTC from PGLC. CEI failed to deliver the gas quantity ordered by respondent for December 1989 when CEI's interruptible orders were bumped off the NGP by cold weather and other actions by NGP. (Finding 10) Respondent is not liable for purchasing stand-by gas in December 1989. ASBCA No. 47106, 96-2 BCA at 142,207-08.

Appellant acknowledged that, in addition to the costs it incurred for purchasing natural gas from suppliers, and for transporting such purchased gas to the "City Gate," it

incurred "management" costs "and a whole bunch of other things" (finding 9). But the record contains no evidence of the costs of "management" or "a whole bunch of other things," Mr. Dodds' salary, legal costs, or any overhead or general and administrative costs incurred by CEI during November and December 1989 and July 1990 or at any other time during performance of contract 817. We found that one cannot determine from this record the amount of profit, measured by the difference between the gas price in contract 817 and all costs CEI incurred to perform and deliver such gas to respondent, which CEI lost in the months of November 1989 and July 1990 on account of gas respondent purchased from other sources. (Finding 9) We hold that CEI has failed to prove the quantum of its claim for respondent's breaches of contract 817.

Transportation Cost Adjustment

10. Contract 817's $0.32521/decatherm price for gas transportation to the "City Gate" was subject to the following provisions:

> C.4 DEVELOPMENT OF GOVERNMENT PRICING STRUCTURE
>
> (a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . . .
>
> First, the city gate prices will be adjusted, up or down, to reflect documented changes in

transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority . . . .

* * *

H.14 TRANSPORTATION PRICE ADJUSTMENTS

A. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply:

(1) If during the term of this contract the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the Section B transportation prices, the Contracting Officer shall amend this contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective.

(ASBCA 47106, finding 2)

11. Natural gas is moved through NGP's interstate pipeline by compressors powered by a portion of such gas introduced into the pipeline, which is called "gas lost and unaccounted for" ("GL&UF") (tr. 1/18, 27).

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12. Transportation rates to ship gas on interstate pipelines are regulated by tariffs approved by the Federal Energy Regulatory Commission (FERC) (tr. 1/18, 2/85). We find that transportation service on such pipelines under contract 817 was under a "regulated tariff." Such tariff rates were higher in November through March ("peak" months) and lower in April through October ("off peak" months) (exh. G-7Q).

13. On 15 September 1989 FERC approved final gas transportation tariffs, retroactive to 1 January 1989. On 1 April 1990 FERC approved NGP's revised transportation tariffs for November 1989 to March 1990. (ASBCA 47106, finding 32)

14. CEI made 24 natural gas deliveries by "interruptible transportation service" under contract 817 from June 1989 to September 1990, and obtained gas one or more times from NGP receipt points (or "clusters") A-11, A-9, A-15, A-12, A-6, A-10, G-8, G-9, A-8ii, A-7, A-1 and A-2, each of which had distinct tariff rates (exhs. A-C, G-20Q; ASBCA 47106, findings 4-5, 33).

15. With respect to those 24 deliveries, the record contains no evidence that: (a) CEI paid any transportation charge directly to NGP; or (b) any of CEI's suppliers billed CEI, or CEI paid to or received from its supplier, an amount corresponding to the difference between the original and the adjusted transportation charge which resulted from FERC's September 1989 or April 1990 gas transportation tariff revisions.

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16. The parties stipulated to the accuracy and completeness of the volume of gas CEI delivered at "City Gate," the NGP receipt and delivery clusters, the amended tariff rates for such receipt and delivery clusters, the Gas Research Institute (GRI) and Annual Charge Assessment (ACA) surcharges, and the GL&UF percentages in effect at the times of each of the 24 deliveries set forth in exhibit G-20Q, columns D, E, F, I, J, K and M (tr. 1/8-9; 4 June 1997 stipulation). The parties computed NGP transportation charge adjustments for CEI's 24 deliveries (exhs. A-C, -D, -I, -N, -O, -P; G-3Q, -5Q, -9Q, -11Q, -13Q, -20Q, -21Q, -22Q, -24Q, -30Q).

17. CEI calculated a transportation price adjustment of $200,995.65 (exh. A-D) by comparing: (a) the $.32521/ decatherm contract transportation price, with (b) the so-called "actual" transportation charge paid to CEI's suppliers (subcontractors). CEI substantiated by contemporaneous correspondence the "actual" transportation prices on which it agreed with its suppliers for 15 of the 24 deliveries (exh. A-E). We accord no probative weight to CEI's unsubstantiated allegations of "actual" prices for 9 of the 24 deliveries in exhibits A-C and A-D.

18. CEI calculated transportation price adjustments of $253,591.59 (exh. A-1) and $277,902.25 (exh. A-P) by comparing: (a) the $.32521/decatherm contract transportation price, with (b) the NGP transportation tariff in effect at the time of each delivery as a result of FERC's 1989 and 1990 tariff revisions (tr. 2/114; column "I" of exh. G-20Q). Comparing those same factors, respondent

calculated transportation adjustments of $10,801.57 (exhs. G-3Q, -4Q) and $11,988.57 (exhs. G-5Q, -6Q).

19. CEI calculated a $222,990.62 transportation price adjustment by comparing: (a) the $.32521/decatherm contract transportation price with (b) the NGP transportation charge at the time of award derived from "column T" in respondent's exhibit G-20Q. Several such entries from "column T" were erroneous. (Exh. A-O)

20. Respondent calculated transportation adjustments of ($15,850.50) (exhs. G-13Q, -14Q) and ($17,087.19) (exhs. G-22Q, -23Q) by comparing: (a) the pre-March 1989 NGP (pre-award) tariff, with (b) CEI's so-called "actual" transportation costs (tr. 1/161-62). Figures in parentheses indicate negative amounts.

21. The adjustments described in findings 17-20 did not compare the differences between the pre-award and amended tariffs in effect at the time of each of the 24 deliveries, but rather introduced as factors in the comparison the so-called "actual" transportation charges or the $.32521/ decatherm contract transportation price. We find that such adjustments were not "supported by tariff modifications" which "affect[ed] the actual cost of transportation" as prescribed by clause C.4 (see finding 10).

22. Respondent calculated adjustments of $6,599.03 (exhs. G-11Q, -12Q); $6,559.32 (exhs. G-20Q, -21Q); and ($36,722.04) (exhs. G-24Q, -25Q; tr. 1/162-65) by comparing: (a) the pre-award NGP tariffs in CEI's exhibit A-1, or, in the case of exhibit G-24Q, the "Interim

Settlement Rates" in respondent's exhibit G-15Q, with (b) the amended NGP tariffs in effect at the time of each delivery. Such "Interim Settlement Rates" were compiled during litigation by a Government employee who did not testify, and allegedly corresponded to "Rates attached to letter dated June 20, 1989," which letter is not in evidence. We accord no probative weight to the "Interim Settlement Rates" in exhibit G-15Q, and hence to the calculations in exhibit G-24Q.

23. Exhibit G-11Q calculated gas lost charges from entry cluster gas quantities; exhibit G-20Q calculated gas lost charges from delivery cluster gas quantities (tr. 1/159-60). Exhibit G-20Q's calculations correspond more closely with the formula derivable from NGP's 1 February 1989 "Instructions for Determining Transportation Rates, Charges and Percentages for Fuel Gas and Gas Lost and Unaccounted For Under Interruptible Transportation Service" (ASBCA 47106, R4, tab 6). Respondent's $1.47 "supply price" used for its October 1989 calculations (delivery 7) should have been $1.3382 (tr. 1/142). The column "W" extensions in exhibit G-20Q contain mathematical errors. As corrected, the theoretical adjustment in exhibit G-20Q is $6,585.02.

24. To determine whether any FERC-approved transportation tariff revisions could have affected transportation prices CEI actually incurred for the 24 deliveries, the NGP "Total Transportation Charges" (TTC), NGP Cluster Rates, CEI's "Actual" transportation charges paid and CEI's cluster rates paid to CEI's suppliers at the times of deliveries were:

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Del.	FERC-Amended NGP TTC	TTC Actually Paid by CEI	FERC-Amended NGP Cluster Rate	Cluster Rate Actually Paid by CEI
1	.3479	.3531	.2384	.2575
2	.3483	.3531	.2509	.2511
3	.4219	NPE*	.2807	.2830
4	.2485	NPE	.1894	.1856
5.	.3607	NPE	.2509	.2511
6.	.3201	NPE	.2208	.2191
7.	.4346	.4118	.3138	.3182
8.	.3467	.3407	.2509	.2511
9.	.4555	.4207	.3291	.3239
10.	.3088	NPE	.2550	NPE
11.	.3059	NPE	.2550	NPE
12.	.4811	NPE	.3451	NPE
13.	.3188	.3116	.2550	.2666
14.	.3151	NPE	.2550	NPE
15.	.5773	.5600	.3874	.3874
16.	.4626	.4639	.3451	.3451
17.	.3069	NPE	.2550	NPE
18.	.3075	.3103	.2550	.2550
19.	.5107	.4982	.3896	.3896
20.	.4738	.4592	.3605	.3605
21.	.4198	.4166	.3194	NPE
22.	.3985	.3256	.3023	NPE
23.	.3933	.3924	.3023	NPE
24.	.3938	.3929	.3023	NPE

(Exhs. G-20Q, columns "I" and "U", A-E)

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* "NPE" = No Probative Evidence in the record.

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25. We further find that the: (a) record contains no evidence of the amounts CEI paid for the TTC or for cluster rates for deliveries 10-12, 14, and 17; (b) amounts CEI incurred for the TTC and for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP TTC and NGP pertinent amended cluster rates for deliveries 1, 2, 16 and 18; (c) amounts CEI incurred for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP pertinent cluster rates for deliveries 3, 5, 7, 8, 13, 15, 19 and 20; and (d) differences between the pre-award and time of delivery TTCs or Cluster Rate charges, decatherms delivered, and corresponding adjustment per delivery (award/delivery difference times decatherms delivered) were:

Del.	Award/Delivery Difference	Decatherms Delivered	Adjustment
1	0	128,301	0
2	.0128	123,776	$1,584.33
3	.0130	67,127	872.65
5	.0128	28,105	359.74
7	.0132	60,324	796.28
8	.0128	109,674	1,403.83
13	(.0117)	3,388	(39.64)
15	(.0123)	270,000	(3,321.00)
16	(.0122)	150,920	(1,841.22)
18	(.0117)	250,015	(2,925.18)
19	.0133	185,000	2,460.50
20	.0133	135,000	1,795.50
Total Adjustment:			$1,145.79

(Exh. G-20Q, columns "V," "D" and "W," as corrected)

Appendix B

DECISION

The requirements for amending the transportation price prescribed in contract clauses C.4 and H.14 were that the tariff changes must: (1) "affect the actual cost of transportation to the city gate," (2) be "supported by tariff modifications" authorized by the applicable regulatory authority, which resulted in "higher or lower rates."

The most direct method of proving adjustments for changed gas transportation tariff rates in compliance with the foregoing requirements would be the documented payment by CEI of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions. This record has no such evidence (finding 15).

In lieu of such direct evidence, the parties sought to reconstruct and to compare, from the various FERC-approved transportation tariffs, what the transportation charges were at the time of contracting in March 1989 and at the time of making each of the 24 gas deliveries from June 1989 through September 1990. Most such calculations compared original or revised tariffs with purported "actual" transportation charges paid to CEI's gas suppliers, or compared the original tariff charges with the contract transportation price of $0.32521/decatherm (findings 17-20). Such comparisons were invalid because: (1) CEI only substantiated the "actual" transportation prices of 15 deliveries by contemporaneous correspondence, and we accorded no probative weight to the remaining 9 unsubstantiated assertions (finding 17); and (2) such

adjustments did not compare the differences between the pre-March 1989 tariffs in effect at the time of contracting and revised tariffs in effect at the time of each delivery. Thus, such adjustments were not "supported by tariff modifications" which "affect[ed] the actual cost of transportation to the city gate" as required by clause C.4 (finding 21).

Only respondent's exhibits G-11Q, G-20Q, and G-24Q compared the differences between the pre-March 1989 tariffs and the amended tariffs in effect at the time of each gas delivery. Exhibit G-24Q used "interim Settlement Rates" to which we accorded no probative weight, so we disregarded that calculation. (Finding 22) Exhibit G-11Q calculated gas lost charges from entry cluster quantities; exhibit G-20Q calculated such charges from delivery cluster gas quantities. The exhibit G-20Q calculations correspond more closely with the formulae in NGP's 1 February 1989 "instructions for Determining Transportation Rates" (finding 23). Exhibit G-20Q shows the theoretical original and amended transportation charges payable to transport gas on the NGP; they do not show what CEI actually incurred for such transportation charges.

We have compared the theoretical NGP Total Transportation Charges (TTC) and Cluster Rates with CEI's "Actual" transportation charges and pertinent cluster rates paid to its suppliers at the times of the 24 deliveries. The record contains no evidence of the amounts CEI paid for the TTC or for cluster rates for deliveries 10-12, 14, and 17. The amounts CEI incurred for the TTC and for the Cluster Rate on account of amended transportation tariffs

equaled or exceeded the NGP TTC and NGP pertinent amended cluster rates for deliveries 1, 2, 16 and 18. The amounts CEI incurred for the Cluster Rate on account of amended transportation tariffs equaled or exceeded the NGP pertinent cluster rates for deliveries 3, 5, 7, 8, 13, 15, 19 and 20. The resulting transportation cost adjustment was a net $1,145.79 for those deliveries where CEI proved that it paid an amount equal to or in excess of the pertinent NGP TTC or Cluster Rate. (Finding 25) We hold that CEI is entitled to recover $1,145.79 as a transportation price adjustment.

Conclusion. We sustain the appeal to the extent of $1,145.79, with Contract Disputes Act interest thereon from the date the contracting officer received the claim, and deny the balance thereof.

Dated: 26 January 1998

s/ David W. James, Jr.
DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I *concur*

s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I *concur*

s/ Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals